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SEP 23 1941

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 640.....

GARTLAND STEAMSHIP COMPANY,
a Corporation,
Petitioner,

vs.

INTERLAKE IRON CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit, and
BRIEF IN SUPPORT OF PETITION.

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WARNER, NORCROSS & JUDD,
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POINT I.—Where, in a personal, private contract of carriage, the parties agree that the vessel owner shall be exempted from all liability for losses resulting from unseaworthiness if due diligence to make her so has been exercised, there is no warranty of seaworthiness and the owner's lack of privity or knowledge carries with it the right to limit 14

POINT II.—Even if the Burlington had been loaded to a draft at which a safe traverse of Lake Macatawa might reasonably have been made, with a fair margin for error in calculation and seasonal variation, the stranding would still have occurred and the alleged negligence could not have been the proximate cause of the disaster.. 17

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable, the Supreme Court of the United States:

A.

STATEMENT.

The petition of The Gartland Steamship Company, a corporation, respectfully shows:

On December 2, 1938, the steamer Burlington, a steel vessel owned by petitioner, loaded a cargo of pig iron belonging to the respondent at Toledo, Ohio and destined for delivery at the Harrington Coal Dock at Holland, Michigan. The dock is located at the head of Lake Macatawa about six miles from Lake Michigan and is reached by a vessel proceeding first through two outer breakwater piers to a stilling basin, through two inner piers to Lake Macatawa and through a dredged channel to the dock.

When the Burlington was in mid-channel and approximately three-fourths of her length through the outer piers into the stilling basin, she stranded. Her master succeeded

in freeing her from this strand by backing into Lake Michigan, where the wind and sea carried her hard aground at a point north of the north breakwater. She became a total loss in the storm which followed, with the loss of a small part of her cargo and the salvaging of the remainder.

The petitioner duly filed its petition for exoneration from, or limitation of, its liability, in the United States District Court for the Western District of Michigan. The respondent filed its claim for loss of cargo and the salvage expenses incurred. Its answer denied all of the material allegations of the petition. Virtually all of the testimony on the merits was heard in open court and there is little dispute as to the facts.

The trial court found that the petitioner had exercised due diligence to make the vessel seaworthy at the time she broke ground at Toledo and that the loss occurred through a "danger of navigation or a peril of the sea," liability for which was exempted by the provisions of the bill of lading which was part of the contract of carriage. The Court ruled that the vessel's estimated draft upon arrival at Holland of 17 feet 3 inches forward and 17 feet 6.1 inches aft, was sufficient to have made it safe to have passed through the outer piers had there been only the seasonal drop of approximately 8½ inches instead of the actual drop of about 2 feet that existed by reason of an unusual barometric phenomenon known as a "seiche," a contingency the master could not reasonably have foreseen. The Court ruled that conditions in Lake Macatawa were not controlling. It entered a final decree dismissing all claims arising out of the loss of the vessel and her cargo.

Upon appeal, the Circuit Court of Appeals accepted the findings of fact of the trial court, but rejected its conclusion that the vessel was seaworthy or that due diligence had been exercised to make her so, at the inception of the voyage. The Appellate Court ruled that, as the estimated draft of the vessel at the time she would have reached

Lake Macatawa was not such so that she could have safely traversed the Lake to the dock, she was not fit for her contemplated voyage, and therefore unseaworthy. While conceding that when unseaworthiness is the basis of the claim there must be a causal relation between the unseaworthiness and the loss, the Appellate Court ruled that the causal relation had been established and the test of proximity met if the thing done or omitted produces immediate danger of injury and is a substantial factor in bringing it about, though the precise result is not foreseen. It concluded that the conditions at Lake Macatawa were of controlling importance inasmuch as had the vessel been loaded to safely traverse the Lake with a reasonable margin for error in calculation and seasonal variation she would probably not have stranded at the entrance to the harbor.

The Circuit Court of Appeals further ruled that the contract of carriage was personal to the petitioner, which carried with it a warranty of seaworthiness unaffected by the lack of privity or knowledge, the breach of which operated to deny limitation of liability. Having found that the vessel was unseaworthy before she broke ground at Toledo, the Court ruled that the vessel was not entitled to the bill of lading exemption against losses "incurred by reason of dangers of navigation or a peril of the seas."

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of federal law which should be but has not been settled by this Court.

The Court below, following controlling decisions of this Court, has ruled that as the contract of carriage was personal to the petitioner, "there is a warranty of seaworthiness and lack of the owner's privity or knowledge will not permit of limitation." We concede the soundness

of that general principle, but the question here involved is whether the owner is similarly denied limitation, in the absence of privity or knowledge, when the parties themselves have agreed that there shall be no warranty. We know of no authoritative decision on this point.

The bill of lading, containing the exemption to which reference has been made, is a standard one adopted in 1936 by most of the vessel owners on the Great Lakes engaged in the transportation of bulk cargo. The importance of securing a final determination of the effect of a provision so commonly used, upon the vessel owner's rights under the statutes granting limitation of liability is, we respectfully urge, manifest.

2. The Circuit Court of Appeals has decided an important question of general law in a way which is untenable and in conflict with the weight of authority.

The Court below, following the doctrine settled in the case of *May v. Hamburg, etc.*, 290 U. S. 333, has ruled that if unseaworthiness is not the proximate cause of the loss the vessel may not be charged with damages. Contrary to the decision of the District Court, which applied foreseeability as the test, the Appellate Court has adopted the "substantial factor" rule and then has misapplied the rule itself. By the weight of authority, an actor's negligence cannot be a substantial factor in producing harm, if the harm would have been sustained even if the actor had not been negligent. *Shearman & Redfield, Law of Negligence* (5 Ed.) Sec. 39; *Restatement of the Law of Torts*, Sec. 432 (1); *Chicago, R. I. & P. Ry. Co. v. Fanning* (C. C. A. 2), 42 F. (2d) 799, 803. A reasonable construction of the proof in this cause requires the conclusion that a proper loading for all phases of the voyage, including Lake Macatawa, would not have prevented the disaster. The standard of care imposed by this decision, in addition to being erroneous, would create practical problems of vessel operation onerous in the extreme.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket, No. 8512, Interlake Iron Corporation, Appellant, v. The Gartland Steamship Company, Appellee, and that the said judgment of the Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioner will ever pray.

THE GARTLAND STEAMSHIP COMPANY,

By FREDERICK L. LECKIE,

Counsel for Petitioner.

DUNCAN LECKIE MCCREARY SCHLITZ & HINSLEA,
WARNER, NORCROSS & JUDD,

Of Counsel for Petitioner.